VI.

After discovering the interest of Marshall L. Davis, Sr. in Norris Beverage Distributors, the Assistant Regional Commissioner would thereby have had reason to believe that because of the past business experience and trade connections of Marshall L. Davis, Sr., the Henry County Beverage Company, Incorporated was not likely to maintain operations in conformity with Federal law.

Following several extensions of time in which to file answer, granted on the motions of respondent, an Answer was filed by respondent on the 16th day of March 1970 stating generally that respondent did not willfully, knowingly or otherwise file a false application for Wholesaler's Basic Permit No. IND-P-1688, a false Addendum to the said application, or otherwise misrepresent or conceal any material fact in the filing of the application or the Addendum thereto.

At the hearing held on March 24, 1970 at Indianapolis, Indiana, following a continuance granted on the motion of the respondent from the date of hearing originally set, respondent was granted leave to file and did file an Amended Answer, Respondent's Pleading 2, striking its original Answer and admitting all material allegations of fact charged in the Order to Show Cause issued to the respondent on November 14, 1969, and waiving hearing on the allegations of fact set forth in the Order to Show Cause. At the hearing, appearance was entered on behalf of the Assistant Regional Counsel by Mr. Bobby S. Tyler, Attorney, Office of the Regional Counsel, Internal Revenue Service, Cincinnati, Ohio. Mr. Daniel P. Byron, of McHale, Cook and Welch, Attorneys at Law, 906 Chamber of Commerce Building, Indianapolis, Indiana, appeared for the respondent.

At a prehearing conference immediately prior to the hearing, certain agreements were reached and subsequently made a part of the record at the hearing by stipulation.

It was stipulated, amongst other things, that I may enter an appropriate Decision sustaining the charges in the Order to

Show Cause and annulling Basic Permit No. IND-P-1688, provided that the stipulation does not affect the respondent's right to submit proposed findings and conclusions of fact or law, and that its right of appeal is the same as is set forth in the Federal Rules of Practice in Permit Proceedings.

It was stipulated that, for the purpose of this hearing only, the documents, or copies thereof, listed in the attachment to Government's Pleading 13 were admitted to the record without objection by either party and may be considered in conjunction with the Order to Show Cause and the respondent's Amended Answer, which Amended Answer admits all material allegations of fact contained in the Order to Show Cause. The documents are contained in the record as Government Exhibits 1 through 45.

FINDINGS AND CONCLUSIONS OF LAW AND FACT

The parties, through counsel, waived the filing of proposed findings of fact and conclusions of law with me reserving the right to file proposed findings and conclusions in the event of appeal. I therefore make the following findings and conclusions, based on the stipulation entered and agreed to by the parties, and the evidence of record.

1. I find as a matter of fact that respondent submitted an application on December 5, 1968, and an Addendum to application on December 30, 1968, to the Assistant Regional Commissioner, pursuant to which Basic Permit No. IND-P-1688 was issued, concealing material facts as alleged in the Order to Show Cause, and these allegations are made by further findings of fact by reference. (Stipulation; Gov. Exh. 3; Gov. Pl. 1.)

2. The Assistant Regional Commissioner was entitled to full, complete and truthful disclosure, and good faith on the part of the respondent in its application for Basic Permit, pursuant to which Permit No. IND-P-1688 was issued. He must have it if he is to issue permits only to persons that are likely to carry on the business for which a permit is issued

"in conformity with Federal law" as specified by the statute, Section 204(a)(2) 27 U.S.C.A. *Middlesboro Liquor and Wine Co., Inc. v. Berkshire*, 133 F.2d 39. The respondent had the duty to respond correctly in furnishing the information called for by the application, Form 1632, which was prescribed pursuant to the statute and valid regulations, Section 204(c), Title 27 U.S.C.A., 27 CFR, Part I. It did not do so, and the failure is very significant.

A correct answer could have been followed by an investigation to determine whether violations of Sections 205(a) and (b) of Title 27 U.S.C.A., or other violations, were being committed which would have had a bearing upon the question of whether the respondent, the then applicant, would be likely to conform to the Federal law if the permit was issued, or indeed whether it would be able to commence operations within a reasonable period of time within the meaning of Section 204(a)(2), Title 27 U.S.C.A., in view of the requirements of the laws of the State of Indiana.

3. The Courts have frequently recognized that concealment or failure to disclose by applicants for federal liquor permits and other governmental licenses is a serious matter. The United States Court of Appeals for the District of Columbia, in annulling a Federal liquor permit, pointed out:

> "The law requires full disclosure and good faith on the part of the applicants for such privileges as are here involved." *Middlesboro Liquor and Wine Co., Inc. v. Berkshire, supra.*

The Second Circuit has also denounced concealment and misrepresentation of facts by an applicant for Federal liquor permit. The Court affirmed the denial and annulment of permits on this ground. *Roumanian American Winery, Inc. v. Morgenthau*, 152 F.2d 452; *Thomas J. Molloy & Co., Inc. v. Berkshire*, 143 F.2d 218, cert. den. 323 U.S. 802; *Capitol Wine & Spirits Corporation v. Berkshire*, 150 F.2d 619, cert. den. 327 U.S. 783.

The concealment of facts in a renewal application for a radio station license, contended by the applicant to have

been of a not uncommon character, was held by the United States Supreme Court to be ample grounds for denial of the renewal application. *FCC v. WOKO, Inc.*, 229 U.S. 323, 67 S.Ct. 213. The Court pointed out:

> "The fact of concealment may be more significant than the facts concealed. The willingness to deceive a regulatory body may be disclosed by immaterial and useless deceptions as well as by material and persuasive ones. We do not think it is an answer to say that the deception was unnecessary and served no purpose."

4. Basic Permit No. IND-P-1688 was procured by misrepresentation and concealment of material fact as set out heretofore. Section 204(e), Title 27 U.S.C.A. provides that "a basic permit shall by order of the Secretary of the Treasury, after due notice and opportunity for hearing to the permittee—(3) be annulled if the Secretary finds that the permit was procured through fraud, or misrepresentation, or concealment of material fact."

DECISION

It is ordered that Wholesaler's Basic Permit No. IND-P-1688 held by Henry County Beverage Company, Incorporated, under the Federal Alcohol Administration Act, authorizing operations as a wholesale dealer in malt beverages at 125 North 26th Street, New Castle, Indiana, be, and the same hereby is, annulled.

This Decision is forwarded to the Assistant Regional Commissioner, Alcohol, Tobacco and Firearms, Internal Revenue Service, Cincinnati, Ohio, for the issuance of the necessary order.

Robert S. Kelley
Hearing Examiner

Chicago, Illinois
June 2, 1970

APPENDIX B

TREASURY DEPARTMENT
INTERNAL REVENUE SERVICE

UNITED STATES OF AMERICA
Southern Judicial District of Indiana

In the Matter of the Order to Show Cause Why Wholesaler's Basic Permit No. IND-P-1688 Should Not be Annulled

Henry County Beverage Company Incorporated, 125 North 26th Street New Castle, Indiana

Docket No.
FAA CIN-ATF-2780

Central Region
Internal Revenue Service

ORDER OF THE PRINCIPAL AIDE TO THE COMMISSIONER AFFIRMING THE HEARING EXAMINER'S DECISION AND ASSISTANT REGIONAL COMMISSIONER'S ACTION ANNULLING BASIC PERMIT

The petitioner holds a basic permit as a wholesaler of malt beverages (permit no. IND-P-1688). On November 14, 1969, the Assistant Regional Commissioner, Alcohol, Tobacco and Firearms, Central Region, alleged that the petitioner had procured this basic permit through fraud, misrepresentation, and concealment of material facts. On November 14, 1969, the Assistant Regional Commissioner issued an Order to Show Cause why the permit should not be annulled. On February 11, 1970, a hearing examiner conducted a hearing on this Order to Show Cause in Indianapolis, Indiana. Specifically, it was alleged that from November 26, 1958, to the present time (November 14, 1969), Marshall L. Davis, Sr., the president of Henry County Beverage Company, Inc., held a substantial interest in and exercised extensive control over Norris Beverage Distributors which held a wholesaler's basic permit; that the petitioner in item 15 of its application for a wholesaler's basic permit dated December 5, 1968, and in an addendum dated December 30, 1968, deliberately concealed a material fact by failing to list Marshall L. Davis, Sr., an officer, director and holder of more than ten percent of the

capital stock of Henry County Beverage Company, Inc., as having held a financial interest in Norris Beverage Distributors; that in item 21 of this application and in this addendum, the petitioner deliberately concealed a material fact by failing to list Marshall L. Davis, Sr., an officer, director and holder of more than ten percent of the capital stock of Henry County Beverage Company, Inc.; as holding an interest in Norris Beverage Distributors; that had the said financial interest of Davis been revealed, the application would have been denied in that Indiana law provides that no wholesale beer permit shall be issued to any person holding an interest in any other such permit; that had petitioner revealed that Marshall L. Davis, Sr., held or had ever held the financial interest in Norris Beverage Distributors, the application would have been denied in that Marshall L. Davis, Sr., had violated 27 U.S.C. 205(a) by restricting the business activities of the Norris Beverage Distributors and had thereby, indirectly and through an affiliate, required by agreement and otherwise that the customers of Henry County Beverage Company, Incorporated, purchase beer from Henry County Beverage Company, Incorporated, to the exclusion in full or in part of Norris Beverage Distributors; and that after discovering the interest of Marshall L. Davis, Sr., in Norris Beverage Distributors, the Assistant Regional Commissioner would thereby have had reason to believe that because of the past business experience and trade connections of Marshall L. Davis, Sr., the petitioner was not likely to maintain operations in conformity with Federal law.

On March 16, 1970, the petitioner, following several extensions of time in which to file answer, filed a short answer stating generally that it did not willfully, knowingly or otherwise, file a false application or addendum to such application, and that it did not willfully, knowingly, or otherwise misrepresent or conceal material fact in the filing of said application or addendum. On March 24, 1970, the petitioner filed a motion for leave to file an amended answer, stating that it did not desire to contest the facts alleged by the Government in its Order to Show Cause; that it desired to waive the

hearing on the allegation of facts set forth in the Order to Show Cause; and that the amended answer obviated the necessity of the hearing inasmuch as "permittee, by such amended answer, admits to all material allegations of fact and disposes of all issues to be resolved by such a hearing in favor of the Government." An amended answer was subsequently filed, striking the original answer and admitting all material allegations of fact charged in the Order to Show Cause to be true. The parties stipulated, in effect, that for the purposes of the hearing, Government Exhibits 1 through 45 were admitted to the record without objection by either party.

In a decision dated June 2, 1970, the hearing examiner ordered that Petitioner's Wholesaler's Basic Permit be annulled. This decision was based on findings that, in the application and addendum to the application for said basic permit, the petitioner concealed material facts; that the petitioner had a duty to respond directly in furnishing information called for by the application and failure to do so was very significant; that the courts have frequently recognized that concealment of or failure to disclose by applicants for Federal liquor permits and other Government licenses is a serious matter; and that this basic permit was procured by misrepresentation and concealment of material fact. The Assistant Regional Commissioner approved this recommendation and ordered the permit annulled.

The petitioner entered an appeal, from the Hearing Examiner's Decision and the order of the Assistant Regional Commissioner, to the Director, Alcohol, Tobacco and Firearms Division. As this appeal involved a matter which was within the jurisdiction of the present Acting Director, Alcohol, Tobacco and Firearms Division, when he held the position of Assistant Regional Commissioner, Alcohol, Tobacco and Firearms, Central Region, the Commissioner designated me, one of his principal aides, to consider the appeal. This designation was made pursuant to 26 CFR 200.116.

Not only did the petitioner admit the material allegations in the Order to Show Cause, but stipulated that, for purposes

of the hearing only, the documents listed in the attachment to Government Exhibit 13 (Governments Exhibits 1 through 45) would be admitted and would be considered. (Page 15 of Transcript) These documents, which were in the certified record of the hearing, and which were before the hearing examiner, contain substantial evidence to support the decision to annul the basic permit.

These documents show that in the latter part of 1958, there were two wholesale beer distributors in Henry County, Indiana. One of these was Henry County Beverage Company, Inc., a partnership operated by Marshall L. Davis, Sr. and Williard H. Hiatt as equal partners. Donald J. Norris was employed at that time by Henry County Beverage Company, Inc. as beer delivery man, and in order to eliminate competition, Davis and Hiatt ordered and directed Norris to purchase the competitor wholesale beer business and run it as a one-man operation, for which Norris would receive a salary. Davis told Norris not to worry about money for the purchase as he (Davis) would arrange everything (Government Exhibit 36, Statement of Willard H. Hiatt on July 2, 1969). Norris then entered into an agreement to purchase this wholesale beer distributorship which was in competition with Henry County Beverage Company, Inc. (Government Exhibit 32).

On October 31, 1958, Donald J. Norris, dba Norris Beverage Distributors, submitted as application for a basic permit under the Federal Alcohol Administration Act as a wholesaler of malt beverages (Government Exhibit 12). This application was signed by Norris as "Sole owner". After an investigation (Government Exhibits 13 and 14), basic permit CIN-P-802 was issued to Norris on November 26, 1958 (Government Exhibit 16).

On December 18, 1958, less than one month after the issuance of the above Basic Permit CIN-P-802, Donald J. Norris and his wife executed a promissory mortgage note in the amount of $75,000 payable to the order of Keith W. Tyler, Indianapolis, Indiana. This note was secured by a chattel mortgage on all right, title, and interest held by Donald

and Wanda Norris in Norris Beverage Distributors. In addition, all profits to be realized by Norris Beverage Distributors over and above certain operating expenses as set out in a separate agreement were assigned to Tyler. This supplemental agreement specified that no other moneys were to be expended in the operation of Norris Beverage Distributors except for the following listed operating expenses: (1) All State and Federal Licenses; (2) Leasehold expenses (rent); (3) Utilities on leaseholds; (4) Operating expenses of one truck; and (5) Salary to be paid to Donald Norris in the amount of $7,000 per year. Significantly, Tyler assigned all his right, title, and interest in Norris Beverage Distributors by virtue of the above documents to Marshall L. Davis, Sr. and Willard Hiatt (Government Exhibit 33, mortgage note, chattel mortgage, supplemental agreement and assignment).

Donald J. Norris related in a statement on June 2, 1969 (Government Exhibit 31), that at no time was any explanation given to him as to why the $75,000 figure was used and not some other figure such as $50,000 or $100,000. Norris stated that a sum of money in that amount or articles of that value were never transferred between any of the persons signing the above documents; that such sum did not represent any investment by anyone in Norris Beverage Distributors to the best of his knowledge; and that he received nothing of value from either Tyler, Davis or Hiatt. Tyler was not even present when the above mortgage was signed and Norris had not met Tyler at that time. Norris also related that on the night he signed the above mortgage, he mentioned to Marshall L. Davis, Sr., that he thought some provision should be made for him (Norris) to have a chance to buy the business some day. Several days later, Davis came to Norris with a written agreement whereby Norris would have the first option to buy Norris Beverage Distributors at such future time as Keith Tyler or his assigns did not wish to retain it. (Government Exhibit 34)

Donald Norris further explained that throughout the time Norris Beverage Distributors had been operating from 1958

to about mid-1968, Marshall L. Davis, Sr., has had the final say in all matters of importance. Any time a decision was necessary on matters outside the normal routine of business, Norris had to consult Davis and was bound by Davis' decision. Davis refused to allow Norris to hire additional help, purchase a forklift truck, or participate in promotional plans presented by the various breweries. In his statement of July 7, 1969, Norris estimated that Norris Beverage Distributors was doing about one-half the business it could be doing had Davis not imposed the various restrictions on Norris Beverage Distributors.

Around 1963, Donald Norris began looking around for other business premises, as the real estate and building where Norris Distributors was located at that time were put up for sale. Norris found the present location and was directed by Marshall L. Davis, Sr., to purchase that property. The purchase was completed on February 27, 1964, and a first mortgage note and real estate mortgage in the amount of $3,000 payable to Henry County Savings and Loan Association was signed by Donald and Wanda Norris. However, at the direction of Marshall L. Davis, Sr., a mortgage and promissory note on the above property was later executed by Donald and Wanda Norris on April 9, 1964, in favor of Davis and Willard H. Hiatt (Government Exhibit 35).

It therefore appears obvious that Keith W. Tyler was merely acting as a "strawman" for Marshall L. Davis, Sr., and Willard H. Hiatt in the above transactions. In addition, the supplemental agreement and the restrictions imposed by Marshall L. Davis, Sr., effectively limited the operation of Norris Beverage Distributors so that it could not compete with the other wholesale beer distributor in Henry County, Indiana; namely, Henry County Beverage Company, Inc., which was, in fact, owned by Marshall L. Davis, Sr., and Willard H. Hiatt.

The hearing examiner was justified in concluding that Marshall L. davis, Sr., was the real owner of Norris Beverage Distributors, both by reason of Petitioner's Answer and by

reason of the documents which, by stipulation, were admitted in evidence.

Mr. Earl N. Davis, the attorney for the petitioner and for Marshall L. Davis, Sr., tendered to me a document which purports to be an assignment by Marshall L. Davis, Sr., of his interest in Norris Beverage Company to Keith W. Tyler on October 1, 1966. The document further purports to reassign this interest from Tyler to Marshall L. Davis, Jr., and Earl N. Davis. However, I concluded that I could not consider this document as it was presented for the first time on appeal and was not offered to the hearing examiner. The regulations do not contemplate a *de novo* hearing on an appeal such as this. Section 200.116, CFR, provides in part:

> "He [the Director, Alcohol, Tobacco and Firearms Division] may alter or modify any finding of the examiner (or of the Assistant Regional Commissioner in initial application proceedings) and may affirm, reverse, or modify the decision of the examiner . . . or he may remand the case for a further hearing, *but he shall not consider evidence which is not a part of the record.*" (Emphasis supplied.)

The petitioner contends that the action of the hearing examiner and the Assistant Regional Commissioner is of an arbitrary nature, without reasonable warrant in fact, and contrary to the law and regulations. The petitioner emphasized that it has admitted only those allegations which are deemed to be material, and has not admitted any other allegations of fact or conclusion of law. It contends that the Government has confused conclusions of law with allegations of fact, and insists there is no basis for the conclusions reached by the hearing officer. Petitioner's brief states that its amended answer reduces the issues of this cause to a construction of the Government's Order to Show Cause. I note, however, that the petitioner's brief contains a second point, namely that the hearing examiner's decision does not follow the law cited in the decision.

The petitioner contends that the sole allegations of material fact alleged by the Government are those facts

stated in the allegations II and III of the Government's Order to Show Cause. These allegations state that the petitioner, in item 15 and in item 21, respectively, of the application and addendum, deliberately concealed a material fact by failing to list Marshall L. Davis, Sr., an officer, director and holder of over ten percent of the capital stock of Henry County Beverage Company, Inc., as having an interest in Norris Beverage Distributors. To the contrary, paragraph I alleges very specific material facts. One is that Davis held a substantial interest in Norris Beverage Distributors; another is that he exercised extensive control from on or about November 14, 1958, to the date of the Order to Show Cause, November 14, 1969. The petitioner cannot escape the actuality that it admitted these facts in its amended answer; thus, it cannot now claim that the facts alleged do not reveal when Davis held the financial interest in Norris Beverage Distributors; it cannot now stand on its proposition that perhaps it was a thirty-second holding; nor can it contend that perhaps Davis held only a $3.00 interest in Norris Beverage Distributors, as a substantial interest is specifically alleged and admitted.

I cannot concur with the petitioner's argument that there are no allegations to show the require element of knowledge, or from which knowledge can be inferred. Paragraphs II and III of the Order to Show Cause allege that the petitioner deliberately concealed material facts. Of course, it is elementary that knowledge and intent are matters which can seldom be proved by direct evidence, as it is impossible to look into one's mind. However, such knowledge is customarily proved by all the circumstances of a given case. The petitioner does not contend it was ignorant of Davis' financial interest in Norris Beverage Company, and the hearing officer was justified, on the basis of the circumstances, in concluding that the petitioner had such knowledge.

The petitioner has admitted the material facts alleged, and that the information omitted from the application was "deliberately concealed" is patently material.

The petitioner also complains that the hearing examiner's decision fails to explain how the petitioner's concealment of

facts is material. On the contrary, the findings and conclusions of law and fact of the hearing examiner succinctly cover this point in paragraph II of such findings. As is there set forth, the Assistant Regional Commissioner must have a full, complete and truthful disclosure on the part of permittees if he is to issue permits only to persons that are likely to carry on the business for which the permit is issued in conformity with Federal law as specified by the statute, section 204(a)(2), Title 27, United States Code. The hearing examiner explains, in more detail, that a direct answer could have been followed by an investigation to determine whether violations of section 205(a) and (b) of Title 27, United States Code, or other violations, were being committed which would have had a bearing upon the question of whether the permittee would be likely to conform to the Federal law if a permit was issued; or whether it would be able to commence operations within a reasonable period of time in view of the requirements of the laws of the State of Indiana.

Petitioner's brief contends that the cases of *Middlesboro Liquor and Wine Company, Inc. v. Berkshire*, 133 F.2d 39, and *F.C.C. v. WOKO, Inc.*, 329 U.S. 223, do not support the findings of the hearing examiner, and that the decision of the hearing examiner, while citing these cases, does not follow them. This contention is not valid. In the *Middlesboro* case, when the appellant filed its application for a basic permit, Floyd Ball was a principal stockholder and signed and executed the application for the permit. He purported to have divested himself of all interest in the company after an investigation threatened to reveal his record and prevent issuance of the permit. However, subsequent investigation revealed that the purported withdrawal was a subterfuge and that he had not in fact divested himself of all interest in the company. The court upheld the annullment of this permit and said, "the purpose of the law is clearly revealed by its prohibition against the issuance of permits to persons who are not likely to carry on the business for which the permit is issued 'in conformity with Federal law'; and by its further provision for annulment; under which the challenged order

in the present case was issued." The substantial difference is that case and the instant case is the difference in the facts concealed. Nevertheless, either set of facts would likely warrant the denial of the permit, and the *Middlesboro* case is very much in point.

The hearing examiner very appropriately and to the point cited *F.C.C. v. WOKO, Inc.*, 329 U.S. 223, and quoted that case for the proposition that the fact of concealment may be more significant than the facts concealed. Two hundred and forty shares of WOKO stock, being twenty-four percent of the outstanding capital stock, were owned by one Pickard and his family. He obtained the stock on the assurance that he would help to secure Columbia affiliation for the station and would furnish the station with certain other benefits. The company, in reporting the names of the stockholders to the Federal Communications Commission, concealed the fact that the Pickards held the stock and represented that the shares were held by others. As in the instant matter, it was urged in that case that the Commission had failed to find that the concealment was of material facts or had influenced the Commission in making any decision, or that it would have acted differently if it had known that the Pickards were the beneficial owners of the stock. To this contention the United States Supreme Court said:

> "We think this is beside the point. The fact of concealment may be more significant than the facts concealed. The willingness to deceive a regulatory body may be disclosed by immaterial and useless deception as well as by material ones . . . . We do not think it is an answer to say that the deception was unnecessary and served no purpose."

The hearing examiner found that the petitioner's basic permit was procured by misrepresentation and concealment of material fact. By the admissions of the material facts in the Government's allegations, and by the documents which were stipulated into evidence, it is clearly established that such was the case. The evidence supports the action of the Assistant

Regional Commissioner taken upon the recommendation of the hearing examiner.

Therefore, On this *22nd* day of February, 1971, the aforesaid decision of the hearing examiner annulling basic permit no. IND-P-1588 is affirmed.

/s/Leon C. Green
Deputy Assistant Commissioner
(Compliance)

APPENDIX C

In the

United States Court of Appeals

For the Seventh Circuit

No. 71-1326 SEPTEMBER TERM AND SESSION 1971

HENRY COUNTY BEVERAGE COMPANY, INC., *Petitioner,*

v.

SECRETARY OF THE TREASURY, *Respondent.*

Petition for Review of a Decision of the Secretary of the Treasury.

DECEMBER 2, 1971

Before DUFFY, HASTINGS and KNOCH, *Senior Circuit Judges.*

DUFFY, *Senior Circuit Judge.* This is a petition to review and set aside an order of the Deputy Assistant Commissioner of the United States Internal Revenue Service dated February 22, 1971, annulling Wholesaler's Basic Permit No. CIN-P-1688 issued to petitioner, Henry County Beverage Company, Inc., (Henry County), operating in and around New Castle, Indiana.

Section 4(e)(3) of the Federal Alcohol Administration Act, 27 U.S.C. § 204(e)(3) provides that a basic permit shall, by order after due notice to the permittee, "be annulled if the Secretary finds that the permit was procured through fraud, or misrepresentation or concealment of material fact. . . ."

From 1958 when Henry County acquired control of Norris Beverage Distributors (Norris), another New

Castle, Indiana wholesale beer distributor, until December 5, 1966, Marshall L. Davis, Sr. and one Hiatt operated Henry County as a partnership.

On December 5, 1966, Henry County filed an application for a new basic permit due to its incorporation under the laws of Indiana. Davis retained one-half of the authorized stock of Henry County. The application was signed by Davis as president, but the application failed to state the interest of Davis in Norris as required in basic permit applications.

Two years later, on December 5, 1968, Henry County filed an application for the basic permit here in question due to a change in ownership of fifty percent of its capital stock. After an investigation of this application, Henry County was issued Wholesaler's Basic Permit CIN-P-1688 on January 7, 1969.

Following the issuance of this permit, the Alcohol, Tobacco and Firearms Division conducted an investigation with respect to the true ownership of Norris; an order to show cause dated February 18, 1969 was issued. Norris' Basic Permit was annulled on June 17, 1970 after the Secretary of the Treasury affirmed a Hearing Examiner's finding that Norris had procured his permit by misrepresenting and concealing the material fact that Davis and Hiatt (Davis' former partner) held a controlling interest in Norris Beverage Distributors.

Following an investigation, the Assistant Regional Commissioner issued an order dated November 14, 1969, directing Henry County to show cause why its Wholesaler's Basic Permit should not be annulled for its alleged wilful and knowing misrepresentation and concealment of a material fact.

The show cause order charged that from November 26, 1958 to the filing of the order, Marshall L. Davis, Sr., President of Henry County, held a substantial interest in and exercised extensive control over Norris Beverage Distributors (Norris); that Henry County, in its application dated December 5, 1968 and in an addendum dated December 30, 1968, deliberately concealed a material fact by failing to list Davis, an officer and holder of more than

10% of the capital stock of Henry County, as having a financial interest in Norris.

The order also alleged the application would have been denied had such facts been known, as Indiana law provides that no Wholesale Beer Permit shall be issued to any person holding an interest in more than one such permit.[1] Also, that Davis had violated 21 U.S.C. § 205(a) by restricting the business activities of Norris to the benefit of Henry County.

After several extensions, Henry County filed an answer stating generally that it did not wrongfully and knowingly file a false application or addendum.

A hearing was held on March 24, 1970. Henry County filed a motion for leave to file an amended answer stating it did not desire to contest the facts alleged by the Government and it admitted all the material allegations of fact.

The Examiner found that Henry County's application and addendum misrepresented and concealed a material fact. Also, that the act of concealment was highly material to the administrative determination of whether to grant a basic permit. The Deputy Assistant Commissioner as the delegate of the Secretary of the Treasury, affirmed the decision of the Examiner by order entered February 22, 1971. A petition for review by this Court followed.

It is undisputed that from 1958 when Norris Beverage Distributors was formed, Marshall L. Davis, Sr., held a principal interest in two wholesale beer distributorships in express violation of Indiana law. 4 Burns Stat. Ann. 12-508, 12-915 (1956 as amended in 1966).

Henry County admits it obtained its permit through concealment of the more than 10% interest of Davis in another beer wholesaler (Norris). The Government insists that the record shows that Henry County had a consistent pattern of deception and anticompetitive conduct on the part of its dominant officer, Davis.

---

[1] During the period Henry County existed, as a partnership, Davis and Hiatt were expressly precluded by Indiana law from owning or having any interest, direct or indirect, in more than one wholesale beer distributorship. 4 Burns Ind.Stat. Ann. 12-508, 12-915 (1956), as amended in 1966 (1970 Cum. Supp.).

On December 18, 1958, one month after their basic permit had issued, the record shows Donald Norris and his wife, Wanda, executed a promissory mortgage note in the amount of $75,000 to the order of Keith W. Tyler, an Indianapolis attorney. This note was secured by a chattel mortgage on the Norris' right, title and interest in Norris Beverage Distributors. A supplemental agreement was also executed with the mortgage agreement assigning to Tyler all profits to be realized by Norris above certain operating expenses and Norris' annual salary of $7,000. Tyler thereafter assigned all his right, title and interest to Davis and Hiatt, then partners in Henry County. This arrangement continued until Norris' basic permit came under question and was subsequently annulled. An estimated $65,000 was paid from Norris to Davis and Hiatt under the mortgage agreement.

We think it is established by the record in this case that had Davis' secret control of Norris Beverage been disclosed in Henry County's permit application, the application would have been denied.

Henry County argues that "No significance could be attached to Davis' effort to channel sales into one of two controlled competitor beer wholesalers." We think this argument is not sound and is contrary to the express language of Section 5(a) prohibiting the channeling of such sales "by agreement or otherwise."

The petitioner argues upon appeal that the Hearing Examiner and the Treasury Department misconstrued the pertinent statutory language in determining that the non-disclosure of Davis' dual interests in Henry County's basic permit application was material. Yet, in *White* v. *United States*, 355 F.2d 58, 63 (8 Cir., 1966), after reviewing the Congressional intent behind the disclosure requirement of 27 U.S.C.A. § 204, stressing the materiality of any misrepresentation or concealment of fact relating to the identity or character of principles to a permit application, the Court said:

> "Inherent in the accomplishment of these ends would be the necessity of having disclosure made of the identity of those who wanted to go into or take over such a business. The making of such identifica-

tion would have materiality as a matter of law, and any misrepresentation or concealment as to the persons so going into or taking over a liquor business would, regardless of their character, be matter per se 'of material fact' in relation to the permit provisions of Sec. 204. Cf. *Middleborough (sic) Liquor & Wine Co.* v. *Berkshire*, 77 U.S. App. D.C. 88, 90, 133 F.2d 39, 41 (1942)."

The Hearing Examiner cited *F.C.C.* v. *Woko, Inc.*, 329 U.S. 223 (1946). He pointed out that the Supreme Court said ". . . The fact of concealment may be more significant than the facts concealed. The willingness to deceive a regulatory body may be disclosed by immaterial and useless deception as well as by material ones. We do not think it is an answer to say that the deception was unnecessary and served no purpose."

We are of the opinion that the Hearing Examiner had ample justification to hold the concealment herein material in relation to the permit provisions of Sec. 204.

The stipulated record discloses a course of deception and wilful misrepresentation on the part of Marshall L. Davis, Sr., involving the procurement and illegal operation of a competitor wholesale distributorship.

We hold that the order of the Deputy Assistant Commissioner dated February 22, 1971, affirming the Hearing Examiner's decision annulling Basic Permit CIN-P-1688 should be and is

AFFIRMED.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit.

USCA 3921—The Scheffer Press, Inc., Chicago, Illinois—12-2-71—260

PETITION FOR WRIT OF CERTIORARI

Supreme Court, U.S.
FILED
FEB 10 1972
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1025

HENRY COUNTY BEVERAGE CORPORATION,
Petitioner,

v.

SECRETARY OF THE TREASURY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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TABLE OF CONTENTS

	Page
OPINION BELOW	2
JURISDICTION	2
QUESTION PRESENTED	2
STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	4
REASONS FOR GRANTING WRIT	4

TABLE OF AUTHORITIES

Cases:

Consolidated Flower v. Civil Aeronautics Bd., 905 F.2d 449 (9th Cir. 1953)	11
Dunn v. Decca Records, 120 F. Supp. 1 (S.D.N.Y. 1954)	7
England v. Moore Equipment Co., 94 F. Supp. 532 (D.C. Cal. 1951)	11
F.C.C. v. WOKO, 329 U.S. 223, 67 S.Ct. 203, 91 L.Ed. 204	5, 6
Howell v. Port of New York Authority, 34 F. Supp. 797 (D.C. N.J. 1940)	11
In re Haskvitz, 104 F. Supp. 173 (D.C. Minn. 1952)	11
In re Perry, 157 F. Supp. 910 (D.C. Mich. 1958)	11
Robinson v. United States, 114 F.2d 475 (C.A.D.C. 1940)	7
Smith v. Day, 65 F. Supp. 209 (D.C. Iowa 1946)	11
Willoughby v. Jamison, 103 F.2d 821 (8th Cir. 1939)	7

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TO THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE UNITED STATES SUPREME COURT:

Petitioner respectfully asks this Court to issue a Writ of Certiorari to review the final judgment of the United States Court of Appeals for the Seventh Circuit which affirmed the ruling of the Secretary of the Treasury revoking petitioner's alcoholic beverage wholesale permit.

OPINION BELOW

The opinion of the Seventh Circuit in this cause is as yet unreported. The original opinion of the Seventh Circuit and its ruling on the petition for hearing are printed in Appendix A and Appendix B hereto.

JURISDICTION

The denial of the petition for rehearing by the Seventh Circuit took place on January 11, 1972. The statutory provision believed to confer jurisdiction upon this Court is Title 28, United States Code, Section 1254(1).

QUESTION PRESENTED

Whether a misrepresentation of fact can be the basis for a license revocation where the pertinent statute provides for such revocation only in the case of *material* misrepresentations on the theory that any misrepresentation is material because of the moral wrongdoing involved in the misrepresentation. Petitioner contends that such a rationale renders the word "material" in the statute meaningless and that no statutory language should be construed in such a manner as to render it meaningless.

STATUTORY PROVISIONS INVOLVED

Title 27, United States Code, Section 205 is the pertinent statute and it reads as follows:

> 205. *Unfair competition and unlawful practices.* It shall be unlawful for any person engaged in business as a . . . wholesaler of . . . malt beverages . . . (a) *Exclusive outlet.* To require by agreement or otherwise, that any retailer engaged in the sale of distilled spirits, wine, or malt beverages, purchase any such products from such person to the exclusion in whole or in part of distilled spirits, wine, or malt beverages sold or offered for sale by other per-

sons in interstate or foreign commerce, or if such person engages in such practice to such an extent as substantially to restrain or prevent transactions in interstate or foreign commerce in any such products or if the direct effect of such requirement is to prevent, deter, hinder, or restrict other persons from selling or offering for sale any such products to such retailer in interstate or foreign commerce; or (b) *Tied house.* To induce through any of the following means, any retailer, engaged in the sale of distilled spirits, wine, or malt beverages, to purchase any such products from such person to the exclusion in whole or in part of distilled spirits, wine, or malt beverages sold or offered for sale by other persons in interstate or foreign commerce, if such inducement is made in the course of interstate or foreign commerce, or if such person engages in the practice of using such means, or any of them, to such an extent as substantially to restrain or prevent transactions in interstate or foreign commerce in any such products or if the direct effect of such inducement is to prevent, deter, hinder, or restrict other persons from selling or offering for sale any such products to such retailer in interstate or foreign commerce (1) by acquiring or holding (after the expiration of any existing license) any interest in any license with respect to the premises of the retailer; or (2) by acquiring any interest in real or personal property owned, occupied, or used by the retailer in the conduct of his business; or (3) by furnishing, giving, renting, lending, or selling to the retailer, any equipment, fixtures, signs, supplies, money, services, or other thing of value, subject to such exceptions as the Administrator (Secretary of the Treasury) shall by regulation prescribe, having due regard for public health, the quantity and value or articles involved, established trade customs not contrary to the public interest and the purposes of this subsection; or (4) by paying or crediting the retailer for any advertising, display or distribution service; or (5) by guaranteeing any loan or the repayment of any financial

obligation of the retailer; or (6) by extending to the retailer credit for a period in the industry for the particular class of transactions, as ascertained by the Administrator (Secretary of the Treasury) and prescribed by regulations by him; or (7) by requiring the retailer to take and dispose of a certain quota of any such products."

STATEMENT OF THE CASE

The Petitioner corporation obtained a federal beer wholesalers license with an application which stated that no person having more than a ten percent interest in the corporation had an interest in any other alcoholic beverage business. The said representation was false in that a person having more than a ten percent interest in the petitioner-corporation did, in fact, have a controlling interest in another beer wholesaler. A decision adverse to the Petitioner corporation was then rendered at the Respondent's Cincinnati Office and subsequently affirmed upon a review by the Respondent's Washington office. A petition then was filed within the time provided in the United States Court of Appeals for the Seventh Circuit with the adverse result heretofore stated. This Petition for Certiorari is brought after the overruling of Petitioner's Petition for Rehearing in the Seventh Circuit which occurred on January 11, 1972, and it is brought within the time allowed.

REASONS FOR GRANTING WRIT

The pertinent facts in this case never have been in dispute. These pertinent facts are as follows:

1. The Petitioner corporation obtained a federal beer wholesaler's license with an application which indicated that no person having more than a ten percent interest in the corporation had an interest in any other alcoholic beverage business.

2. The said representations made in the course of the said applications were factually incorrect in that a person having more than a ten percent interest in the Petitioner corporation did in fact have a controlling interest in another beer wholesaler.

The Petitioner corporation has contended at all times that the above stated facts which constituted the essence of the Department of Treasury's allegations were and are immaterial and not a basis for revocation of the Petitioner corporation's license.

The Hearing Examiner, in the initial administrative proceeding herein, found that the aforesaid concealment of the facts was material in that it concealed violations and defects under Sections 205(a) and (b) and 204(a)(2) of Title 27, United States Code which would have caused a denial of the license application if they had been known at the time of the application. (R. 338)

The administrative appeals tribunal, at the second and final stage of the administrative processes herein, found that the question of materiality was irrelevant and cited case authority in support of its legal finding. (R. 439-440)

The Hearing Examiner who presided over the first stage of the administrative-tribunal process in this cause concluded that the Petitioner had made material misrepresentations in obtaining its license. The appellate administrative tribunal tacitly recognized that this was erroneous by choosing to reply on the proposition that it made no difference whether or not the unrevealed facts were material.

At the final stage of administrative appeal in this cause the Deputy Assistant Commissioner (Compliance) arrived at the following legal conclusion regarding the issue of materiality:

> "The hearing examiner very appropriately and to the point cited F.C.C. v. WOKO, Inc., 329 U.S. 223

As in the instant matter, it was urged in that case that the Commission had failed to find that the concealment was of material facts or had influenced the Commission in making any decision or that it would have acted differently if it had known that the Pickards were the beneficial owners of the stock. To this contention the United States Supreme Court said:

> "We think this is beside the point. The fact of concealment may be more significant than the facts concealed. The willingness to deceive a regulatory body may be disclosed by immaterial and useless deception as well as by material ones. We do not think it is an answer to say that the deception was unnecessary and served no purpose."

(R. 439-440)

The decision of the United States Supreme Court in *F.C.C. v. WOKO*, 329 U.S. 223, 67 S.Ct. 203, 91 L.Ed. 204 involved the statute published at Title 47, United States Code, 312(2) which reads as follows:

> 392. Administrative sanctions—(a) Any station license or construction permit may be revoked—(1) for false statements knowingly made either in the application or in any statement of fact which may be required pursuant to section 308:

47 U.S.C. 312(a)

Thus the statute, which the United States Supreme Court's decision in *F.C.C. v. WOKO, Inc.*, pertained to, provided for the revocation of a federal license upon a showing that *any* false statement had been made by the licensee in his or its application. With section 312(a) of Title 47 and on other occasions Congress has chosen to omit the element of materiality in providing penalties for misinformation in the filling out of licensing forms.

> "It is apparent that the purpose of Congress in enacting this latter section was to leave no doubt, or room for interpretation as to whether or not the information required to be given on such applica-

tions was material. *Any false swearing in regard to such matters shall be deemed perjury.*

Robinson v. United States, 114 F.2d 475 (C.A.D.C. 1940). But the statute involved in this case, Title 27, United States Code, Section 204(e)(3) specifically provides for revocation of a license only upon a showing of fraud or misrepresentation or concealment relating to a *material* fact.

> . . . (c) A basic permit shall be order . . . after due notice and opportunity for hearing to the permitee . . . (3) be annulled if the Secretary finds that the permit was procured through fraud, or misrepresentation, or concealment of *material* fact . . ." (Emphasis supplied) . . .
>
> *27 U.S.C. 204(e)(3)*

Congress' choice of words in Title 27, United States Code, Section 204(e)(3) renders the test for a violation of that statute the same as the test for what constitutes a violation of the typical perjury statute where materiality likewise is essential.

It has been held that the materiality of an allegedly false statement must be determined in the context of what is at stake in the inquiry which produces such an allegedly false statement.

> "What facts are material to any inquiry must be determined by the nature of the right or liability asserted."

Willoughby v. Jamison, 103 F.2d 821, 823 (8th Cir. 1939) and that the misinformation provided in the allegedly false statement must be such that it could or would effect the outcome of the inquiry.

> "I do not believe that it has been established that the ommission complained of here, if indeed it did occur, is material . . . . No clear showing has been made that the failure to disclose was of such substance that it would influence the stockholder's proxy vote. The potential injury is too remote and speculative."
>
> *Dunn v. Decca Records*, 120 F. Supp. 1, 2 (S.D. N.Y. 1954).

> "The materiality required is not as to any particular issue in the case, but as to the trial as a whole, that is, materiality is determined by whether the false testimony was capable of influencing the tribunal on the question before it. Carroll v. United States, 2 Cir. 16 F.2d 951, Luse v. United States, 9 Cir. 44 F.2d 776, United States v. Shinn, C.C., 14 F. 447, 453, United States v. Slutzky, 3 Cir. 79 F.2d 504, 505, Fields v. State, 94 Fla. 490, 114 So. 317, Hanscom v. State, 67 N.W. 419, People v. Albert, 91 Cal. App. 774, 267 F. 587."

In the present case, however, it makes no difference. It will be shown hereinafter that there was *no possible basis* for concluding that the misinformation involved of this case was of any *possible* significance.

On the question of materiality the hearing examiner in this case made the following finding:

> "A correct answer could have been followed by an investigation to determine whether violations of Sections 205(a) and (b) of Title 27 U.S.C.A., or other violations, were being committed which would have had a bearing upon the question of whether the respondent, the then applicant, would be likely to conform to the Federal Statute if the permit was issued, or indeed whether it would be able to commence operations within a reasonable period of time within the meaning of Section 204(a)(2), Title 27 U.S.C.A., in view of the requirements of the laws of the State of Indiana." (R-338)

Neither of the things which the hearing examiner found "could have" been followed by a correct disclosure instead of the incorrect disclosure actually *could* have taken place. The incorrect disclosure involved the assertion that none of the principal stockholders of the corporation which is the appellant in this cause had an interest in a beer distributorship other than the appellant. Economic ties between beer distributors have no significance under Sections 205(a) and (b) or 204(a)(2) of Title 27, United States Code.

The concealment of fact which gave rise to this case likewise could not possibly have any significance under Title 27, United States Code, Section 204(a)(2) which provides as follows:

> "204. *Permits.*—(a) *Persons entitled.* The following persons shall, on application therefor, be entitled to a basic permit: (1) Any persons who, on May 25, 1935, held a basic permit as distiller, rectifier, wine producer, or importer issued by an agency of the Federal Government. (2) Any other person unless the Administrator (Secretary of the Treasury) finds (A) that such persons (or in case of a corporation, any of its officers, directors, or principal stockholders) has, within five years prior to date of application, been convicted of a felony under Federal or State law, or has, within three years prior to date of application, been convicted of a misdemeanor under any Federal law relating to liquor, including the taxation thereof; or (B) that such person is, by reason of his business experience, financial standing, or trade connections, not likely to commence operations within a reasonable period or to maintain such operations in conformity with Federal law; or (C) that the operations proposed to be conducted by such person are in violation of the law of the State in which they are to be conducted."
>
> *Title 27, United States Code, Section 204(a)(1) and (2)*

The only possible provision of significance which the Hearing Examiner could have sought to rely upon in the above quoted statute is that provision which provides that a proposed liquor operation must not be one which would be, if carried into effect, in violation of state law (in this case, the laws of the State of Indiana.) The above quoted finding of the Hearing Examiner makes it clear that this is what the Hearing Examiner had in mind. Undoubtedly, the Hearing Examiner would have been correct and the appellee would be entitled to prevail in this case if there were any provision in the laws of the State of Indiana which would

render it illegal for a stockholder or principal in a corporation dealing in the wholesale of malt liquor to have an interest in another malt beverage wholesaler. Indiana law contains no such provision. The laws of the State of Indiana which are pertinent to the matter at issue read as follows:

> *Burns 12-508 Beer Wholesalers' Permits—Class "A"— Alcoholic malt beverage permits.*—Beer Wholesaler's permits may be issued as hereinafter provided. Any person desiring to sell at wholesale any alcoholic malt beverages shall make application to the commission for permit to sell same at wholesale, which application shall be in writing and verified, on the forms prescribed and provided by the commission. No wholesaler's permit shall be granted to an applicant therefor unless:
>
> 5. Such applicant shall have no interest in any permit to manufacture, or to sell at retail, alcoholic beverages of any kind, or in any other permit to wholesale alcoholic beverages, and shall have no interest, direct or indirect, through stock ownership or otherwise, in any partnership or corporation holding a permit to manufacture, or to sell at retail, alcoholic beverages of any kind, or holding any other permit to wholesale alcoholic beverages of any kind.
>
> 6. If such applicant be a partnership or unincorporated association, all members of such partnership or persons interested in such association, dba, possess the qualifications herein required of an individual applicant.
>
> 7. If such applicant be a corporation, a verified list of the names of the stockholders of such corporation shall be submitted with the application.
>
> *(Indiana Acts 1935, ch. 226, sec. 8, as amended)*

Under Indiana Law, a single individual could be the sole beneficial owner of ever beer wholesaler in the state so long as every such wholesaler were a corporation and the said, hypothetical individual simply were such a massive owner through one hundred percent holdings on all such corporations.

In its decision, the Seventh Circuit merely reiterated the findings of the administrative tribunal again entirely begging the question of whether the use of the word "material" in the pertinent statute is to be given any meaning whatsoever. A holding that the word is to be given no meaning is contrary to the rulings of every federal court that has considered the issue.

Also see: *Consolidated Flower Shipments, Inc.–Bay Area v. Civil Aeronautics Bd.*, 205 F.2d 449 (9th Cir. 1953); *In re Perry*, 157 F. Supp. 910 (D.C. Mich. 1958); *In re Haskvitz*, 104 F. Supp. 173 (D.C. Minn. 1952); *Howell v. Port of New York Authority*, 34 F. Supp. 797 (D.C. N.J. 1940); *England v. Moore Equipment Co.*, 94 F. Supp. 532 (D.C. Cal. 1951) and *Smith v. Day*, 65 F. Supp. 209 (D.C. Iowa 1946).

Accordingly, the petitioner makes the following prayer for relief:

WHEREFORE, Petitioner prays that certiorari be granted and that the decision of the Seventh Circuit in this cause be reviewed and reversed.

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